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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,
Appellant,

v.

STANLEY J. BOWERS,
Tax Commissioner of Ohio
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

PETITION FOR REHEARING.

ROBERT G. DAY,
Second National Building,
Warren, Ohio,

KEITH LAWRENCE,
G. DEL BATES,
1513 Williamson Building,
Cleveland 14, Ohio,
Attorneys for Appellant.

LAWRENCE & BATES,
HOPPE, DAY & FORD,
Of Counsel.

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APPEAL FROM THE SUPREME COURT OF OHIO.

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Petitioner prays that this Court grant rehearing of its order of January 19, 1959 granting the motion to dismiss, dismissing the appeal and denying certiorari, that probable jurisdiction be noted, the case heard on its merits, the judgment of the Supreme Court of Ohio reversed and for such other relief as may be proper in the premises.

The questions involved in the case at bar are essentially the same and are more substantial than in *Society for Savings* and *First Federal*, 349 U. S. 143, 75 S. Ct. 607, in which probable jurisdiction was noted and after argument the judgments of the Ohio Supreme Court were reversed. Those cases originated with Claims for Refund of taxes paid for five years; the case at bar by the alternative procedure of Application for Review and Redetermination of a similar assessment, for one year (1957) only,

before payment of the tax. From that point on the procedure was the same in all three cases as were the questions involved.

The monetary amount involved in *Society for Savings* was $126,115.96, an average of $25,223.19 per year or a little more than the annual amount here involved; the amount of refund for five years involved in *First Federal* totaled $20,540.41, or $810 more than the amount for one year in the case at bar.

The rate of tax in the years involved in *Society for Savings* and *First Federal* was .002, whereas this case involves a tax of .002 (under R. C. § 5707.03 (D)) plus .003 (under H. B. 945) or a total of five mills per dollar on the entire surplus.

The statutes involved in *Society for Savings* and *First Federal* had been construed by the state court as impliedly imposing the tax on the ownership interests of depositors in surplus whereas thereafter the law was amended to make express the implication construed into the former law by the state court.

Now as well as before amendment the law makes no provision for collection by the state from the depositors should the institution fail to pay—another basis of the opinion in *Society for Savings*, 349 U. S. 143 at 151, 75 S. Ct. 607 at 612.

Taxation of the surplus of a mutual institution as against so-called ownership interests of depositors therein results in gross discrimination against them as compared with deposits in non-mutual institutions in competition with them in the same business—banks and savings and loan associations having capital stock and unincorporated banks—the surplus of which inures to the shareholders, partners or proprietors respectively, and not to the depositors. Assuming the case of such an institution having

taxable and exempt deposits and surplus in the same amounts as Appellant, the tax collectible by the institution from its taxable depositors would have been only $96,422.92 ($48,211,460 x .002) as contrasted with the taxes of $96,422.92 on deposits, plus $19,730 on surplus—a total of $116,152.92—in the case at bar. By reason of that discrimination the institution would not dare exercise the right of collecting from its depositors the tax on their "ownership interests" under pain of losing its deposits to its neighboring stock institutions. How can it be said that the nominal right to recover the tax from depositors is not illusory?

Even if the fallacy of the legislative provision for recovery of the tax from depositors be disregarded, the legislature has not and cannot cure the defect that the tax is imposed on "ownership interests" of depositors which they cannot withdraw and which have no other value to them—*Society for Savings* and *First Federal*, 349 U. S. 143, 150, 75 S. Ct. 607, 611; *Collett vs. Springfield Savings Society*, 13 O. C. C. 131 (affirmed 56 O. S. 776). In *Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 A. 543 (affirmed 66 N. J. Eq. 431, 57 A. 1131), in which the court enjoined the proposed dissolution of a savings bank, the court said (p. 553):

> "with regard to the division of the surplus. There is indeed, no known mode of dividing a surplus of a savings bank, when such division becomes necessary, except among the bona fide depositors at the time of the dissolution. *Morristown Sav. Inst. v. Roberts*, 42 N. J. Eq. 496, 8 Atl. 315. But it does not follow that such division is just and equitable. It is a rule of convenience and necessity, not of equity. Consider, in that connection, the temptation of eleventh-hour people to come in as depositors in anticipation of dissolution. In fact, I am confirmed in the view I stated

at the argument, that the attempt to make an equitable division of the surplus of a savings institution, such as we have to deal with here, presents an insoluble problem. That surplus is the result of the surplus earnings of all the money that has been deposited by all the depositors from the beginning of the bank. It is well known that many of those have already withdrawn, and thereby, as it has been well said, have abandoned their share in the surplus; but it by no means follows that the equitable rights of those who remain are any greater by such abandonment than they would have been without it. Then, of those who remain at the end, some have been depositors for a longer time than the others. The present case presents an example of that. In my opinion, the true status of a surplus is that it is held by the institution in trust for the benefit of the immediate community in assisting to maintain and perpetuate the existence of the institution."

There were in Ohio in 1957, approximately 480 mutual savings and loan associations and savings banks, none of which had issued any stock. The questions involved herein are of importance to all of such institutions; before the expiration of five years from the effective date of the amended statutes here involved, they may be expected to file claims for certificate of abatement of the taxes paid on account of the so-called depositors' interests in surplus, reserves and undivided profits, under R. C. § 5703.05 which provides in part as follows:

"(B) * * * the commissioner has the authority on written application of any person, firm, or corporation claiming to have overpaid to the treasurer of state at any time within five years prior to the making of such application any tax payable under any law which the department of taxation is required to administer, or on his own motion investigate the facts and make in triplicate a written statement of his findings, and, if

he shall find that there has been an overpayment, issue in triplicate a certificate of abatement payable to the taxpayer, his assigns, or legal representative which shows the amount of the overpayment and the kind of tax overpaid. * * *"

It is important that an authoritative determination of the constitutionality of the statutes be made by this Court presently rather than await a time when far greater amounts may have accrued and been paid and be subject to abatement on the ground that the amended statutes are unconstitutional.

We submit that for the reasons herein and in the Jurisdictional Statement in the case at bar, rehearing should be granted, that Mr. Justice Harlan should be joined in his opinion that probable jurisdiction should be noted, the case heard on its merits and the judgment of the state court reversed.

Respectfully submitted,

ROBERT G. DAY,
Second National Building,
Warren, Ohio,

KEITH LAWRENCE,
G. DEL BATES,
1513 Williamson Building,
Cleveland 14, Ohio,
Attorneys for Appellant.

LAWRENCE & BATES,
HOPPE, DAY & FORD,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT G. DAY,
KEITH LAWRENCE,
G. DEL BATES,
Attorneys for Appellant.

LAWRENCE & BATES,
1513 Williamson Building,
Cleveland 14, Ohio,

HOPPE, DAY & FORD,
Second National Building,
Warren, Ohio,
Of Counsel.